

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 98-15      December 4, 1998

TO: All Regional Directors, Officers-in-Charge and  
Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: Reinstatement and Backpay Remedies for  
Discriminatees Who May Be Undocumented Aliens  
In Light of Recent Board and Court Precedent

This memorandum sets forth guidance under recent Board and court decisions for determining the propriety of the Board's full reinstatement and backpay remedies for discriminatees who an employer contends or the Region knows to be "undocumented" aliens. General Counsel Memorandum GC 88-9, dated September 1, 1988, is superseded by the instant Memorandum only where it specifically conflicts with this document.<sup>1</sup>

The Immigration Reform and Control Act of 1986 ("IRCA") provides for civil and criminal penalties against any person who knowingly hires or continues to employ an alien who is or has become ineligible to work in the United States (an "undocumented" individual). 8 U.S.C. Sec. 1324a(a). Thus, employees are required to attest and employers required to verify that employees are eligible to work in this country. 8 U.S.C. Sec. 1324a(b). In practice, an individual can satisfy this requirement by completing an INS Form I-9 at or around the time of hire. The applicant uses this form to establish both his or her identity and work authorization. Once the individual has complied with this verification requirement upon hire, the employer may not demand "more or different documents" from the individual in order to reverify his or her work authorization status, unless it learns that the employee has become unauthorized. 8 U.S.C. Sec. 1324b(a)(6). Significantly, an employer may not reverify the work authorization status of any employee who is "continuing in his or her employment and has a reasonable expectation of employment at all times," including any employee who has been reinstated pursuant to an order of any court, arbitrator or administrative law judge.<sup>2</sup>

<sup>1</sup> Thus, the treatment of "grandfathered" employees (i.e., employees hired on or before November 6, 1986) in Memorandum GC

88-9 remains in effect.

<sup>2</sup>  
8 C.F.R. Sec. 274a.2(b)(1)(viii).

In A.P.R.A. Fuel Oil Buyers Group,<sup>3</sup> the Board reconciled Congress' intention under the National Labor Relations Act of sanctioning employers which unlawfully discriminate against statutory employees with its goal under IRCA of deterring the unlawful employment of undocumented aliens in the United States. The employer therein hired two undocumented applicants even though both individuals admitted at the time of hire that they were legally ineligible to work in the United States. The employer subsequently discharged both employees because of their union activities.

Finding that the employer terminated the employees in violation of Section 8(a)(3), the Board extended to them the full protection of the Act and its remedies in their entirety with the express intention to eliminate an unscrupulous employer's incentive to thwart the Act's goals simply by hiring undocumented aliens. Mindful, however, that the discriminatees had already admitted that they were ineligible to work in the United States, the Board conditioned reinstatement "on their satisfaction of the normal verification of eligibility requirements prescribed by IRCA."<sup>4</sup> Since IRCA prohibits an employer from continuing to employ any individual who it knows to be ineligible for work, the Board ordered the employer to extend an offer of reinstatement only after the discriminatees presented to the employer "within a reasonable time" completed INS Form I-9s sufficient to establish their work eligibility.<sup>5</sup> The Board stressed that it imposed this conditional, rather than unconditional, reinstatement remedy solely because the employer knew at the time of hire that the discriminatees were ineligible for employment and, thus, would be liable for sanctions under IRCA if it were to reinstate the discriminatees unconditionally. The Board explicitly acknowledged, however, that, "[i]n the ordinary case, when the IRCA requirements have been met, there may be no need for this additional condition."<sup>6</sup> Although the Board noted that employers may raise questions "with respect to the continued eligibility of individuals for employment," it stressed that employers may do so only "under conditions that comply with the provisions of IRCA."<sup>7</sup> Secondly, the Board awarded the discriminatees backpay until such time as either the employer reinstated them subject to IRCA's verification requirements or the employees were unable

to establish after a "reasonable time" that they were authorized to work in this country.<sup>8</sup>

<sup>3</sup> 320 NLRB 408 (1995), enfd. 134 F.3d 50 (2d Cir. 1997).

<sup>4</sup> Id. at 415.

<sup>5</sup> Ibid.

<sup>6</sup> Id. at 415 n.39.

<sup>7</sup> Ibid.

The Second Circuit enforced the Board's conditional reinstatement and backpay remedies in their entirety. The court noted that the Board's decision enjoys the dual advantage of providing relief to the discriminatees commensurate with their right to work in this country, while it "felicitously keeps the Board out of the process of determining an employee's immigration status."<sup>9</sup>

Pursuant to A.P.R.A., Regions should seek an unconditional reinstatement order absent an affirmative showing by the respondent that a discriminatee is unauthorized to work in this country. Upon such a showing, the discriminatee's conditional, rather than unconditional, reinstatement is appropriate.<sup>10</sup>

In a subsequent case, Hoffman Plastic Compounds, Inc.,<sup>11</sup> the Board clarified an issue which it had explicitly left open. The employer in Hoffman hired and subsequently unlawfully terminated an employee without ever having reason to know that the discriminatee had fraudulently represented to it that he was eligible to work in the United States; it first learned of the employee's unauthorized status during a compliance hearing. Citing to dictum in A.P.R.A.,<sup>12</sup> the Board applied well-settled law which serves to preclude the reinstatement of any employee who engages in unprotected conduct for which the employee would have been discharged and, furthermore, to toll backpay on the date the employer first learns of the misconduct.<sup>13</sup> Concluding that the record established that the employer attempted to comply with IRCA when it hired the discriminatee and finding no evidence that the employer knowingly hired any other employee in violation of IRCA, the Board declined to order the discriminatee's reinstatement and tolled backpay as of the date the employer first acquired knowledge that the employee had used fraudulently procured identification to gain employment.<sup>14</sup>

<sup>8</sup> Id. at 416.

<sup>9</sup> NLRB v. A.P.R.A. Fuel Oil Buyers Group, 134 F.3d at 57.

<sup>10</sup> Regions should submit to Advice cases in which a respondent makes this contention.

<sup>11</sup> 326 NLRB No. 86 (September 23, 1998).

<sup>12</sup> See A.P.R.A., 320 NLRB at 416 n.44.

<sup>13</sup> Hoffman, 326 NLRB No. 86, slip op. at 2, citing Marshall Durbin Poultry Co., 310 NLRB 68, 70 (1993), enfd. in pert. part 39 F.3d 1312 (5th Cir. 1994), and John Cuneo, Inc., 298 NLRB 856, 856-57 (1990).

The foregoing cases raise the further issue of how and under what circumstances can an employer initially question a discriminatee's continued eligibility for employment. We conclude that evidence which an employer may seek to introduce at an unfair labor practice proceeding pertaining to a discriminatee's work authorization status is irrelevant to the underlying question of the employer's liability under the Act and should not be admitted.<sup>15</sup>

We also conclude that questions concerning reinstatement are only appropriately raised in a compliance proceeding.<sup>16</sup> Such evidence concerning a discriminatee's work authorization status is relevant at compliance proceedings only if the respondent has a reasonable basis independent of the compliance proceeding for knowing that the discriminatee cannot lawfully work in the country.<sup>17</sup> In this regard, we would object to the compliance proceeding being used as a fishing expedition to try to determine whether someone is unlawfully in the country. Counsel for the General Counsel should object to questioning concerning a discriminatee's work authorization status and, if necessary, should take a special appeal to the Board on any adverse ALJ ruling. In such circumstances, the Region should argue that there is no IRCA requirement to reverify the work authorization status of a continuing employee, such as a discriminatee subject to a Board reinstatement order. Further, where the purpose of the questioning is to discriminate against an individual because of his or her citizenship or national origin (i.e., the question of the employee's immigration status would not have been asked except for his or her citizenship or

national origin), the Region should contend that the questioning is in violation of IRCA's anti-discrimination provisions as set forth at 8 U.S.C. Sec. 1324b(a)(6).

<sup>14</sup> Hoffman, 326 NLRB No. 86, slip op. at 3.

<sup>15</sup> Thus, a discriminatee's work authorization status is irrelevant where the employer seeks to litigate this issue even though it did not rely on that status when it terminated the employee. See, e.g., Victor's Cafe 52, 321 NLRB 504, 504 n.3, 514-15 (1996) (discriminatees' work authorization status irrelevant to their unlawful discharge where employer did not verify their status until after they engaged in union activity). However, such evidence would be relevant in a mixed motive case. Regions should submit these cases to Advice.

<sup>16</sup> Id. at 504 n.3; Intersweet, Inc., 321 NLRB 1, 1 n.2 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997). See generally Howard P. Foley Co., 229 NLRB 1167, 1167 n.1 (1977), enfd. 580 F.2d 1053 (9th Cir. 1978) (evidence that discriminatee should not be reinstated because he engaged in post-discharge misconduct, excluded from unfair labor practice hearing as irrelevant).

<sup>17</sup> Thus, pursuant to Hoffman, should an employer oppose the Board's normal make-whole remedies because it purportedly learned after the unlawful discharge that a discriminatee it had hired had actually been ineligible to work in this country, the Board's normal reinstatement and backpay remedies remain appropriate unless the employer affirmatively establishes (1) that it had no knowledge that the discriminatee was unauthorized to work while he or she was in its employ, and (2) that the employer has not knowingly hired other employees in violation of IRCA. Where an employer makes such a contention, the Region should submit the case to Advice.

Cases which present issues not resolved by this memorandum should be submitted to the Division of Advice.

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